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No. 01-011827

In The
Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the plaintiffs prevail in a suit against state officers, in their official capacities, to enforce federal statutes for which sovereign immunity has not been abrogated or waived, does sovereign immunity bar an award of attorneys' fees?

2. Assuming that sovereign immunity does not bar an award of attorneys' fees, do constitutional principles of dual sovereignty – including sovereign immunity – preclude an interpretation of 42 U.S.C. § 1988(b) that discriminates against the States?

PARTIES TO THE PROCEEDINGS

The petitioners are two officials of the Virginia State Corporation Commission, each of whom was sued only in his official capacity: (a) E. Joseph Face, Jr., Commissioner of Financial Institutions, and (b) Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions. Deputy Commissioner Hancock is the State Officer charged with the enforcement of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85, and is responsible to Commissioner Face for her actions.

The respondent is the National Home Equity Mortgage Association, a trade organization of home mortgage lenders.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HUTTO* IN LIGHT OF ITS SOVEREIGN IMMUNITY JURISPRUDENCE	6
A. Background: Sovereign Immunity Revitalized	6
B. The *Hutto* Decision	8
C. The *Hutto* Dissent	9
D. Post-*Hutto* Developments	12
1. Views of the Framers	12
2. *Seminole Tribe* Standard	13
3. Circumvention of Sovereign Immunity	17
E. Summary	18

TABLE OF CONTENTS – Continued

Page

II. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HENSLEY* IN LIGHT OF ITS DUAL SOVEREIGNTY JURISPRUDENCE 19

A. The *Hensley* Decision 19

B. Revival of Dual Sovereignty 23

1. Clear Statement Rule 25

2. Sovereign Immunity Prohibits the Courts from Discriminating against the States as a Class 27

C. Summary 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 2

Alden v. Maine, 527 U.S. 706 (1999) 3, 7, 12, 25

Aldridge v. Williams, 44 U.S. (3 How.) 9 (1845) 22

Alexander v. Sandoval, 532 U.S. 275 (2001) 6, 26

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 13

Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) 12

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 25

Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 7, 16, 17, 18

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 20, 21

City of Boerne v. Flores, 521 U.S. 507 (1997) 15, 16, 17

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 7, 17, 18

Correctional Services Corp. v. Malesko, 122 S.Ct. 515 (2001) 26, 27

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 26

Dellmuth v. Muth, 491 U.S. 223 (1989) 15

Ex Parte Young, 209 U.S. 123 (1908) 7, 8, 18

Fairmont Creamery Co. v. Minnesota, 274 U.S. 70 (1927) 28

TABLE OF AUTHORITIES – Continued

Page

Federal Maritime Comm'n v. South Carolina Ports Auth., No. 01-46, slip op. (U.S. May 28, 2002) 1, 3, 12, 23

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 6, 7, 8

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) ..... *passim*

Garcia v. S.U.N.Y. Health Sciences Ctr., 280 F.3d 98 (2nd Cir. 2001) 6

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24, 25

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ of Minn.*, 528 U.S. 1114 (2000) 13

Hutto v. Finey, 437 U.S. 678 (1978) ..... *passim*

Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied, sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) 6

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) ..... *passim*

LaPides v. Board of Regents, 122 S.Ct. 1640 (2002) 6

Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) 6

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 25

National Home Mortgage Ass'n v. Face, 239 F.3d 633 (4th Cir.), *cert. denied*, 122 S.Ct. 58 (2001) 4

TABLE OF AUTHORITIES – Continued

Page

New York v. United States, 505 U.S. 144 (1992).....3, 23

Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998).....22

Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426, 122 S.Ct. 934 (2002).....26

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).....25

Printz v. United States, 521 U.S. 898 (1997).....3, 25

Quern v. Jordan, 440 U.S. 332 (1979) 8

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 122 S.Ct. 999 (2002).....26

Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).....6, 8

Seminole Tribe v. Florida, 517 U.S. 44 (1996).....*passim*

United States v. Lopez, 514 U.S. 549 (1995).....26

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).....23

Verizon v. Maryland Public Service Comm'n, 122 S.Ct. 1753 (2002).....7, 20

Webster v. Fall, 266 U.S. 507 (1925).....22

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1990).....7, 25

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8, cl.3 5

U.S. Const., Amend X 2, 3

TABLE OF AUTHORITIES – Continued

Page

U.S. Const., Amend XI ..... *passim*

U.S. Const., Amend XIV, § 5 ..... 13, 15, 16, 22

STATUTES

Virginia Code § 6.1-330.83 4

Virginia Code § 6.1-330.85 4

12 U.S.C. § 3801 4

20 U.S.C. § 1681 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988(b) ..... *passim*

42 U.S.C. § 2000bb 3

42 U.S.C. § 2000cc 3

42 U.S.C. § 2000d 3

COURT RULE

Sup. Ct. R. 29.4(b) 1

OTHER AUTHORITIES

William Blackstone, *Commentaries On The Laws of England* 237 (Photo reprint. 1979) (1768) 18

John Dickinson, *Letters From A Pennsylvania Farmer* 23

The Federalist No. 28 (Alexander Hamilton) 24

The Federalist No. 39 (James Madison) 24

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 51 (James Madison) 24

The Federalist No. 81 (Alexander Hamilton) 24

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PETITION FOR WRIT OF CERTIORARI

Two officials of the Virginia State Corporation Commission – E. Joseph Face, Jr., and Susan E. Hancock (collectively, "the Commonwealth") – respectfully petition the Court for a writ of *certiorari* to review the judgment of the court of appeals, which ruled that sovereign immunity does not protect the Commonwealth's state treasury against an award of attorneys fees, even though the statute authorizing such awards, as interpreted by this Court, denies States the even-handed treatment that traditionally accompanied the award of costs.

INTRODUCTION

A generation ago, a bare majority of this Court held that sovereign immunity did not bar an award of attorneys' fees under 42 U.S.C. § 1988(b) ("§ 1988"). *See Hutto v. Finey*, 437 U.S. 678, 695 (1978). Shortly thereafter, this Court interpreted § 1988 as mandating that prevailing plaintiffs should routinely recover fees against the States, but that prevailing States should rarely recover fees against plaintiffs. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). However, subsequent decisions of this Court have cast serious doubt on the results in *Hutto* and *Hensley*.[1] "Dual sovereignty is a defining feature of our Nation's constitutional blueprint," and an "integral component" of the States' sovereignty is "immunity from private suits." *Federal Maritime Comm'n v. South Carolina Ports Auth.*, No. 01-46, slip op. at 6 (U.S. May 28,

[1] The Commonwealth is not suggesting that § 1988 is unconstitutional. Rather, the Commonwealth is simply suggesting that the interpretations of § 1988 announced in *Hutto* and *Hensley* are inconsistent with the principles stated in this Court's most recent jurisprudence, and that, in order to avoid unconstitutionality, a revised interpretation is necessary when § 1988 is applied to the States. Thus, there is no reason to notify the Solicitor General that the constitutionality of a federal law is being challenged. *See* Sup. Ct. R. 29.4(b). However, this Court may wish to invite the Solicitor General to express the views of the United States.

2002). Quite simply, if *Hutto* and *Hensley* were to come before this Court today, it seems likely that this Court would rule in exactly the opposite manner. Yet, because only this Court can overrule or modify its decisions, *Hutto* and *Hensley* remain the law of the land. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). This petition presents this Court with an opportunity to revisit *Hutto* and *Hensley* in light of its more recent jurisprudence.[2]

OPINIONS BELOW

The opinion of the court of appeals is reported at 283 F.3d 220 (4th Cir. 2002). It is reprinted in the appendix to this petition at App. 1. The opinion of the district court is unreported, but is reprinted at App. 16.

JURISDICTION

The court of appeals entered its judgment on March 8, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions.

1. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[3]

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[2] Because only this Court can overrule or modify its own decisions, there will never be a split among the courts of appeal or the state supreme courts on these issues. The only way for these issues to be reviewed is for this Court to revisit its own previous decisions.

[3] As this Court observed: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a

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2. The Eleventh Amendment to the United States Constitution, provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State."[4]

3. The federal statute at issue, 42 U.S.C. § 1988(b), provides, in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318,[5] the Religious Freedom Restoration Act of 1993,[6] the Religious Land Use and Institutionalized Persons Act of 2000,[7] Title VI of the Civil Rights Act of 1964,[8] or section 13981 of this title,[9] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

4. The federal statute which allowed the plaintiff to sue these state officers, 42 U.S.C. § 1983 ("§ 1983"), provides, in pertinent part: "Every person who, under color of any

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tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States,* 505 U.S. 144, 156-57 (1992). Moreover, the Tenth Amendment is not the exclusive textual source of protection for principles of federalism. *See Printz v. United States*, 521 U.S. 898, 953 n.13 (1997).

[4] While the Eleventh Amendment confirms the existence of the States' sovereign immunity, it "does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Comm'n*, No. 01-46, slip op. at 7 (U.S. May 28, 2002). *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.")

[5] *See* 20 U.S.C. § 1681.

[6] *See* 42 U.S.C. § 2000bb.

[7] *See* 42 U.S.C. § 2000cc.

[8] *See* 42 U.S.C. § 2000d.

[9] The Violence Against Women Act.

statute, ordinance, regulation, custom, or usage of any State . . . subjects . . . any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding."

STATEMENT OF THE CASE

This petition arises out of an award of attorneys' fees that followed respondent's successful challenge of two Virginia consumer protection statutes. The respondent – the National Home Equity Mortgage Association ("NHEMA") – is a trade association of home mortgage lenders. NHEMA challenged the constitutionality of *Virginia Code* §§ 6.1-330.83 and 6.1-330.85, which limited the ability of state-chartered financial institutions to impose penalties on consumers who pre-pay their mortgages (*e.g.*, when a homeowner refinances or sells his home). Specifically, NHEMA contended that the two state statutes were preempted by a federal law, the Alternative Mortgage Transaction Parity Act, 12 U.S.C. § 3801 ("the Parity Act"). The district court agreed with respondent and entered a permanent injunction prohibiting the petitioners from enforcing these statutes. *See* 64 F. Supp. 2d 584 (E.D. Va. 1999). On appeal, the Fourth Circuit affirmed. *See National Home Mortgage Ass'n v. Face,* 239 F.3d 633 (4th Cir.), *cert. denied*, 122 S.Ct. 58 (2001).

Following the Fourth Circuit's decision on the merits, the district court turned its attention to the petition for attorneys' fees and costs, filed by NHEMA under § 1988 ("the fee petition"). The Commonwealth defended against the fee petition on two grounds relevant to this petition for *certiorari*:

- First, sovereign immunity bars an award of attorneys' fees against the Commonwealth where Congress has not acted under Section 5 of the Fourteenth Amendment to abrogate that immunity. Here the relevant federal law – the Parity Act – was not enacted under Section 5. It was enacted

under the Commerce Clause, U.S. Const., Art. I, § 8, cl.3.

- Second, if sovereign immunity does not absolutely bar an award of attorneys' fees under these circumstances, then principles of federalism and sovereign immunity require the States to be treated *no less favorably* than other litigants. Section 1988, as currently interpreted, violates this principle because States are almost always required to pay attorneys' fees when they lose a lawsuit under § 1983, but are almost never allowed to collect attorneys' fees when they prevail in such a challenge. As a constitutional matter, when there has been no valid abrogation of sovereign immunity, prevailing state defendants and prevailing private plaintiffs must be treated alike. Moreover, the most appropriate standard to use in such an even-handed approach is the one that now governs awards to prevailing state defendants: that is, fees should only be awarded to a prevailing party if the opposing party's legal position is frivolous, unreasonable and without foundation. No one has suggested that the Commonwealth's position meets these criteria. Thus, the fee petition in this case must be denied.

In taking these positions, the Commonwealth was reserving the right to seek reexamination of this Court's decision in *Hutto*, which holds that sovereign immunity does not bar an award of attorneys' fees. The Commonwealth was also seeking eventual reexamination of – or, a distinction from – *Hensley*, which holds that prevailing plaintiffs are routinely entitled to attorneys' fees, at least where constitutional rights are at issue. Correctly recognizing that only this Court may reexamine and overrule its decisions, the court of appeals followed *Hutto*. The court of appeals also declined to adopt the distinction sought by the Commonwealth regarding *Hensley*, ruling instead that *Hensley* precluded an even-handed approach to attorneys' fees even though only economic rights were at issue here.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HUTTO* IN LIGHT OF ITS SOVEREIGN IMMUNITY JURISPRUDENCE.

This Court should grant review in order to revisit *Hutto* in light of recent developments in its sovereign immunity jurisprudence. Quite simply, the conclusion in *Hutto*, that sovereign immunity does not bar a claim for attorneys' fees under § 1988, is incompatible with this Court's more recent pronouncements on the nature of sovereign immunity. Review is warranted to resolve this inconsistency.

A. Background: Sovereign Immunity Revitalized

Whenever private parties sue the State or state officers in their official capacities, sovereign immunity issues inevitably arise. Resolution of these issues depends upon the nature of the substantive statute being enforced. If the statute at issue is one where Congress has abrogated sovereign immunity – or the State has waived it – then sovereign immunity is no barrier to the litigation. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress abrogated sovereign immunity for Title VII claims); *LaPides v. Board of Regents*, 122 S.Ct. 1640 (2002) (State waived sovereign immunity by removing claim to federal court).[10] Alternatively, if the

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[10] The lower federal courts have generally held that, by accepting federal funds, States waive their sovereign immunity for claims based on various anti-discrimination statutes. *See, e.g., Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds sub nom. Alexander v. Sandoval*, 532 U.S. 275 (2001) (receipt of federal funds constitutes waiver of sovereign immunity for Title VI claims); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000) (receipt of federal funds constitutes waiver of sovereign immunity for Title IX claims); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied, sub nom. Arkansas Dep't of Educ. v. Jim C.*, 533 U.S. 949 (2001) (receipt of federal funds constitutes waiver of sovereign immunity for § 504 claims). *But see Garcia v.*

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statute at issue is one for which Congress has not properly abrogated sovereign immunity and for which the State has not waived its immunity, then sovereign immunity bars all claims based on the statute. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (no abrogation for ADA Title I claims); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (no abrogation for ADEA claims); *Alden v. Maine*, 527 U.S. 706 (1999) (implicitly holding no abrogation for FLSA claims); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (no waiver for Lanham Act claims); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (no abrogation for intellectual property claims); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (no abrogation for Indian Gaming Act claims).

Of course, even where there has been no abrogation or waiver of sovereign immunity, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), generally allows private parties to obtain *declaratory* and *injunctive* relief against state officers in their official capacities.[11] *See Verizon v. Maryland Public Service Comm'n*, 122 S.Ct. 1753, 1761 (2002). Consequently, when seeking such a limited remedy, a private party can sue state officers in their official capacities to enforce a federal statute for which there is no abrogation or waiver. *See Verizon*, 122 S.Ct. at 1760

S.U.N.Y. Health Sciences Ctr., 280 F.3d 98, 114-15 (2nd Cir. 2001) (receipt of federal funds is not waiver for § 504 claims). This Court has held that Congress has abrogated sovereign immunity for Title VII claims (race, gender, and religious discrimination claims in employment context). *See Fitzpatrick*, 427 U.S. at 447-48. When these cases are read together, the conclusion is that the States do not enjoy sovereign immunity from discrimination claims based on race or gender. Waiver of sovereign immunity in the context of disability-based discrimination claims is an unresolved question, and is not affected by the issues raised in this petition.

[11] This is true regardless of whether the suit is brought pursuant to the Supremacy Clause or pursuant to 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1990).

(declining to address waiver of sovereign immunity because doctrine of *Ex Parte Young* was applicable).

The availability of limited remedies under *Ex Parte Young* necessarily gives rise to issues involving entitlement to attorneys' fees under § 1988.[12] Specifically, does not sovereign immunity bar such an award of fees? Alternatively, if sovereign immunity does not bar an award of fees, is it nevertheless improper to interpret § 1988 in a manner that discriminates against the States?

B. The *Hutto* Decision

In 1978, when *Hutto* was decided, this Court's decisions imposed few, if any, restraints on the ability of Congress to abrogate sovereign immunity. Indeed, the very idea that Congress could abrogate sovereign immunity had been announced only two years earlier. *See Fitzpatrick*, 427 U.S. at 451-52. Thus, when determining whether sovereign immunity barred an award of attorneys' fees under § 1988, this Court made only a cursory inquiry into whether there was some remote relationship between the statute and the substantive guarantees of the Fourteenth Amendment. The analysis was surprisingly brief:

> As this Court made clear in *Fitzpatrick*, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be

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[12] By its very terms, § 1988 applies only to claims brought under specifically enumerated federal statutes, including *inter alia* Title VI, Title IX and § 1983. Although lower courts have held that the States have waived sovereign immunity for Title VI and Title IX, *see Sandoval* (Title VI), *Litman* (Title IX), sovereign immunity has not been abrogated nor waived for any of the other statutes mentioned in § 1988. *See Quern v. Jordan*, 440 U.S. 332 (1979) (sovereign immunity bars § 1983 claim directly against State).

> broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action.

Hutto, 437 U.S. at 693-94 (citations omitted). Moreover, this Court noted that sovereign immunity traditionally had not applied to the payment of costs by the States. *See id.* at 695-96. Since Congress, in direct contradiction of several hundred years of common law tradition, had redefined the term "costs" to include attorneys' fees, sovereign immunity did not bar an award of attorneys' fees. *See id.* at 693-98. In other words, this Court acquiesced, at least implicitly, in Congress' attempt to circumvent sovereign immunity by manipulating well-defined legal terms from their traditionally accepted meaning.

C. The *Hutto* Dissent

Justice Powell, joined by then Chief Justice Burger, Justice Stewart, and then Associate Justice Rehnquist, vigorously dissented.[13] In a passage that foreshadowed the future direction of this Court's sovereign immunity jurisprudence, Justice Powell observed:

> I cannot subscribe to Part II-B's reading of the Eleventh Amendment as permitting counsel-fee awards against the State on the authority of a statute that concededly does not effect "an express statutory waiver of the States' immunity."
>
> *Edelman v. Jordan* rejected the argument that 42 U.S.C. § 1983 "was intended to create a waiver of the State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." In a § 1983 action "a federal court's remedial power, consistent

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[13] Justice Powell, joined by then Chief Justice Burger, also concurred in other portions of *Hutto*. *See* 437 U.S. at 704.

> with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, . . . and may not include a retroactive award which requires the payment of funds from the state treasury." There is no indication in the language of the Civil Rights Attorneys' Fees Awards Act of 1976 (Act), that Congress sought to overrule that holding. In this case, as in *Edelman*, "the threshold fact of congressional authorization to sue a class of defendants which *literally* includes States is wholly absent." Absent such authorization, grounded in statutory language sufficiently clear to alert every voting Member of Congress of the constitutional implications of particular legislation, we undermine the values of federalism served by the Eleventh Amendment by inferring from congressional silence an intent to "place new or even enormous fiscal burdens on the States."
>
> The Court notes that the Committee Reports and the defeat of two proposed amendments indicate a purpose to authorize counsel-fee awards against the States. That evidence might provide persuasive support for a finding of "waiver" if this case involved "a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities." But in this sensitive area of conflicting interests of constitutional dimension, we should not permit items of legislative history to substitute for explicit statutory language. The Court should be "hesitant to presume general congressional awareness," of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States.

Id. at 704-06 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (emphasis added) (citations and footnotes omitted). In other words, Justice Powell and his dissenting colleagues rejected the notion

that sovereign immunity would permit an award of fees for the successful enforcement of a statute for which sovereign immunity had not been abrogated or waived. Justice Powell and his dissenting colleagues also emphatically rejected the idea that sovereign immunity could be abrogated without express language to that effect in the statutory text.

Moreover, Justice Powell and his dissenting colleagues were skeptical of the concept, embraced by the *Hutto* majority, that Congress could avoid sovereign immunity simply by changing the traditional term "costs." Justice Powell observed:

> I am unwilling to ignore otherwise applicable principles simply because the statute in question imposes substantial monetary liability as an element of "costs." Counsel fees traditionally have not been part of the routine litigation expenses assessed against parties in American courts. Quite unlike those routine expenses, an award of counsel fees may involve substantial sums and is not a charge intimately related to the mechanics of the litigation. I therefore cannot accept the Court's assumption that counsel-fee awards are part of "the ordinary discipline of the courtroom."
>
> Moreover, counsel-fee awards cannot be viewed as having the kind of "ancillary effect on the state treasury," that avoids the need for an explicit waiver of Eleventh Amendment protections. As with damages and restitutory relief, an award of counsel fees could impose a substantial burden on the State to make unbudgeted disbursements to satisfy an obligation stemming from past (as opposed to post-litigation) activities. It stretches the rationale of *Edelman* beyond recognition to characterize such awards as "the necessary result of compliance with decrees which by their terms [are] prospective in nature." In the case of a purely prospective decree, budgeting can take account of the expenditures entailed in compliance, and the State retains some

> flexibility in implementing the decree, which may reduce the impact on the state fisc. In some situations fiscal considerations may induce the State to curtail the activity triggering the constitutional obligation. Here, in contrast, the State must satisfy a potentially substantial liability without the measure of flexibility that would be available with respect to prospective relief.

Id. at 707-08 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part) (citations and footnotes omitted). In sum, sovereign immunity cannot be circumvented simply by engaging in semantic games.

D. Post-*Hutto* Developments

In the years since *Hutto*, this Court has revitalized the original meaning of sovereign immunity. *See Federal Maritime Comm'n*, No. 01-46, slip op. (U.S. May 28, 2002). It has done so in three ways: (1) by emphasizing the views of the Founders, (2) by tightening the requirements for abrogating sovereign immunity, and (3) by disapproving legislative attempts to circumvent sovereign immunity. Each will be discussed in turn.

1. Views of the Framers

First, this Court has recognized that sovereign immunity is far broader than the text of the Eleventh Amendment. *See Alden*, 527 U.S. at 730. Rather, it bars all "proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Federal Maritime Comm'n*, No. 01-46, slip op. at 9 (U.S. May 28, 2002). Thus, in determining whether sovereign immunity bars an award of costs against the States under § 1988, this Court must ask whether, in 1788, a party who obtained injunctive relief against a state officer in federal court would be able to recover attorneys' fees against the State treasury.

The answer is clearly no. In *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), this Court held that attorneys'

fees were not recoverable against *any party* in federal court. *See also Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 249-50 (1975) (discussing history of availability of attorneys' fees in federal courts.) Obviously, if *no* party was liable for attorneys' fees in 1796, then the sovereigns, be it the national sovereign or the States, could not be liable for attorneys' fees in federal court in that era. The Framers would not have thought otherwise. Thus, under this Court's revitalized sovereign immunity jurisprudence, sovereign immunity must bar an award of attorneys' fees against the States in federal court.

2. *Seminole Tribe* Standard

Second, in *Seminole Tribe*, this Court adopted Justice Powell's suggestion and tightened the requirements for abrogation of sovereign immunity. Today, congressional abrogation of sovereign immunity can be accomplished only if a stringent two-part test is met. It must be shown that (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. Unless both conditions have been satisfied, Congress' attempt at abrogation is invalid. *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 824 (8th Cir. 1998), *cert. denied, sub nom. United States v. Regents of the Univ. of Minn.*, 528 U.S. 1114 (2000).

a. Nature of the Claim

Before applying the *Seminole Tribe* test to this case, it is first necessary to identify the nature of the claim and the statute at issue. This inquiry requires three levels of analysis, looking first at § 1988, then at § 1983 (the statute allegedly triggering § 1988), and finally at the Parity Act (the statute being enforced through § 1983).

i. NHEMA's case is a claim for attorneys' fees under § 1988. Under *Hensley*, there is a substantive right to recover attorneys' fees when plaintiffs have prevailed

under any of the statutes enumerated in § 1988. For some of these statutes, Congress has arguably abrogated sovereign immunity. For other statutes, States conceivably may have waived their sovereign immunity. Logically, if the statute that is the basis for invoking § 1988 is one for which sovereign immunity has been abrogated or waived, then sovereign immunity does not bar recovery of fees. Conversely, if the statute that is the basis for invoking § 1988 is one for which sovereign immunity has *not* been abrogated or waived, then sovereign immunity must bar the claim. Thus, the first critical issue is identifying the statute that NHEMA invokes for claiming entitlement to an award of fees under § 1988.

ii. The statute on which NHEMA relies in seeking fees under § 1988 is § 1983. However, unlike other statutes enumerated by § 1988, § 1983 does not confer substantive rights. Rather, it is simply a vehicle by which private parties may enforce substantive rights already conferred by the Constitution or by other federal statutes. Again, Congress has arguably abrogated sovereign immunity for many of the federal statutes enforceable through § 1983. Conceivably, the States have waived sovereign immunity for other statutes enforceable through § 1983. Logically, if the statute being enforced through § 1983 is one for which sovereign immunity has been abrogated or waived, then there is no sovereign immunity bar to the recovery of fees. Conversely, if the statute being enforced through § 1983 is one for which sovereign immunity has *not* been abrogated or waived, then sovereign immunity bars the recovery of fees. Thus, the second critical question becomes: what federal statute was NHEMA enforcing through § 1983?

iii. The answer, of course, is the Parity Act. Therefore, the third critical question is whether sovereign immunity has been abrogated or waived for claims based on the Parity Act. If so, then there is no bar to NHEMA's recovery of fees for having prevailed in its § 1983 claim to enforce the Parity Act. Conversely, if sovereign immunity has not been abrogated or waived for the Parity Act, NHEMA cannot recover fees under § 1988. There is no suggestion here that the Commonwealth has *waived* sovereign

immunity. Thus, the ultimate question is whether Congress has abrogated sovereign immunity for the Parity Act. Therefore, the two-part inquiry of *Seminole Tribe* must be applied to the Parity Act. As the following discussion will show, sovereign immunity has not been so abrogated.

b. Application of *Seminole Tribe*

i. Application of the two part test of *Seminole Tribe* compels the conclusion that sovereign immunity has not been abrogated for the Parity Act. First, there is nothing in the Parity Act explicitly stating a Congressional intent to abrogate sovereign immunity. Under current sovereign immunity jurisprudence, a Congressional intent to abrogate cannot be inferred. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). *See also Kimel*, 532 U.S. at 99-100 (Thomas J., joined by Kennedy, J., concurring in part and dissenting in part) (suggesting that the clear statement rule had not been met by the ADEA). This alone is enough to show that sovereign immunity has not been abrogated here.

ii. Moreover, even if Congress had expressed its intent to abrogate sovereign immunity, it would still not be enough for NHEMA to prevail. Under the second part of the *Seminole Tribe* test, Congress cannot effectuate an abrogation under its Article I powers; it must act pursuant to § 5 of the Fourteenth Amendment. Congress did not do so here. Nothing in the Parity Act suggests any relationship whatsoever with the Fourteenth Amendment.[14] Moreover, determining whether the attempt to abrogate sovereign immunity is valid under § 5 of the Fourteenth Amendment requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive

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[14] Of course, even where Congress has said it is invoking the Fourteenth Amendment, its statement does not necessarily mean that it has actually done so. *See Florida Prepaid*, 527 U.S. at 637-38.

guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions"; and (2) "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 527 U.S. at 639.

The first part of the *Flores* test – identifying the transgressing conduct – likewise has two components. First, the Court must "identify with some precision the scope of the constitutional right at issue." *Garrett*, 121 S.Ct. at 963.[15] Nothing in the Parity Act speaks to any constitutional right. Second, once the Court has "determined the metes and bounds of the constitutional right in question," the Court examines "whether Congress identified a history and pattern of unconstitutional . . . discrimination by the States. . . . " *Garrett*, 121 S.Ct. at 964.[16]

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[15] In assessing whether Congress has identified unconstitutional conduct, courts look at judicial opinions, not the pronouncements of Congress. *See Kimel*, 528 U.S. at 81; *Flores*, 521 U.S. at 519. That is, Congress must defer to this Court's interpretation of the Constitution and not assume for itself the task of defining constitutional rights.

[16] In making this examination, this Court has carefully limited when unconstitutional conduct may be attributed to the States. For example, the Court recognizes that: (1) conduct that may violate federal law does not necessarily violate the Constitution, *see, e.g., Kimel*, 528 U.S. at 84-85 (finding the restrictions of the ADEA far more stringent than those imposed by the Equal Protection Clause); (2) conduct by private actors or society in general cannot be ascribed to the States, *see id.* at 649; (3) unconstitutional conduct by governmental entities that are not considered arms of the State cannot be ascribed to the State, *See Garrett*, 531 U.S. at 369 ("It would make no sense to consider constitutional violations on [the] part [of local government entities], as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment."); and (4) even if there is unconstitutional conduct by the States, the fact that one State or even several States have violated the Constitution does not constitute a pattern of constitutional violations by all the States, *see Kimel*, 528 U.S. at 89-90 ("Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union.").

Again, nothing in the Parity Act speaks to any history or pattern of unconstitutional conduct by the States. Of course, if there is no identified pattern of constitutional violations, then sovereign immunity has not been properly abrogated and the inquiry ends. *College Sav. Bank,* 527 U.S. at 675.

Alternatively, if a pattern of specific constitutional violations is found, then this Court must proceed to the second part of the *Flores* test and determine if the abrogation of sovereign immunity is a proportionate response to the violations. *See Florida Prepaid,* 527 U.S. at 646. In the case at bar, since the Parity Act does not implicate any such pattern, this second part of *Flores* is never reached.

In sum, the test for a valid abrogation of sovereign immunity is quite stringent and analogous to strict scrutiny in the context of the fundamental rights of individuals. Not surprisingly, since this Court began employing the strict abrogation test, not a single congressional attempt at abrogation has passed constitutional muster. *See Garrett*, 531 U.S. at 373-374; *Kimel*, 528 U.S. at 89-92; *Florida Prepaid*, 527 U.S. at 646-48, *Seminole Trible*, 517 U.S. at 75-76. Congress has not abrogated sovereign immunity for Parity Act claims enforced through § 1983, nor has the Commonwealth waived sovereign immunity for such claims. Thus, under this Court's revitalized sovereign immunity jurisprudence, sovereign immunity bars NHEMA's claim for attorneys' fees under § 1988.

3. Circumvention of Sovereign Immunity

Third, this Court has expressed disapproval of Congress' attempts to circumvent sovereign immunity by engaging in verbal manipulations. This Court observed:

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.* Forced waiver and abrogation are not even different sides of the same coin – they are the same

> side of the same coin. . . . *There is little more than a verbal distinction between saying that Congress can make Florida liable to private parties for false or misleading advertising in interstate commerce of its prepaid tuition program, and saying the same thing but adding at the end "if Florida chooses to engage in such advertising."*

College Savings Bank, 527 U.S. at 683-84 (emphasis added) (citations omitted). In other words, "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel*, 528 U.S. at 80. Consequently, Congress cannot circumvent sovereign immunity and indirectly undermine *Seminole Tribe*, *Florida Prepaid*, *Kimel*, and *Garrett* by blatant verbal manipulations, such as redefining "costs" to include attorneys' fees.

E. Summary

In sum, given this Court's revitalized sovereign immunity jurisprudence, the continued validity of *Hutto* is seriously in doubt. First, this Court now insists that application of sovereign immunity must turn on the state of the law at the time of the Constitution's adoption. Although English common law apparently allowed injunctive relief against governmental officers at the time of the Revolution, *see* William Blackstone, *Commentaries On The Laws Of England* 237 (photo reprint. 1979) (1768),[17] it is doubtful that one can find persuasive authority for the recovery of attorneys' fees against the public treasury in such a situation. Second, under the *Florida Prepaid-Kimel-Garrett* framework, this

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[17] As a practical matter, there is no real distinction between Blackstone's concept that writs can be obtained against an agent of the crown who acts contrary to law and the doctrine of *Ex Parte Young* where federal courts may enjoin state officials who act contrary to federal law. In both instances, it is assumed that the sovereign cannot act contrary to law and that any official of the sovereign who does so cannot be acting in the name of the sovereign. Thus, the official is no longer entitled to the protections of the sovereign's immunity.

Court now demands that strict scrutiny be applied to Congress' attempts to abrogate sovereign immunity. Under this standard, it seems unlikely that Congress has validly abrogated sovereign immunity for Parity Act claims enforced through § 1983. Third, this Court has expressed skepticism about Congress' ability to circumvent sovereign immunity through statutory redefinitions of terms whose meaning has been long established. It is questionable whether Congress can circumvent sovereign immunity by changing a definition of "costs" that prevailed when the Constitution was ratified and that dates back through centuries of common law. Of course, this Court need not resolve these doubts in order to grant this petition. Rather, this Court should grant the petition and, after due deliberation, determine whether the sovereign immunity holding of *Hutto* should be overruled.

II. THIS COURT SHOULD GRANT REVIEW TO REVISIT *HENSLEY* IN LIGHT OF ITS DUAL SOVEREIGNTY JURISPRUDENCE.

This Court should grant review in order to revisit *Hensley* – as it applies to the States – in light of recent developments in its dual sovereignty jurisprudence. Quite simply, the conclusion in *Hensley*, that the proper interpretation of § 1988 is to award fees against losing States as a matter of course, but rarely to award fees against losing plaintiffs, is incompatible with this Court's more recent pronouncements on role of the States in our constitutional system. In our system of dual sovereignty, there are certain structural safeguards which preclude the institutions of the national sovereign, including the federal courts, from diminishing the sovereignty of the States. Yet, *Hensley,* as applied to the States, does exactly that. Review is warranted to resolve this inconsistency.

A. The *Hensley* Decision

1. By its very terms, § 1988 grants federal courts the *discretion* to award attorneys' fees to prevailing parties in

certain types of litigation between private parties and governmental entities. There is nothing in the statute that mandates that the prevailing party should recover attorneys' fees as a matter of course. Certainly, there is nothing which states or even implies that private parties who prevail will almost certainly recover fees while the States will almost never recover. Because this Court "will not presume that the statute means what it neither says nor implies," *Verizon*, 122 S.Ct. at 1759, the obvious and logical interpretation of § 1988 is that it grants courts the discretion to award fees to prevailing parties and does not discriminate between prevailing plaintiffs and prevailing States.

2. Although this is the most compelling interpretation of the plain words of § 1988, this Court, in *Hensley*, adopted an interpretation of § 1988 whereby private parties who prevail recover fees as a matter of course, while States that prevail recover fees only in those rare instances where the plaintiffs' claims are frivolous. Although such an interpretation is at odds with the clear language of the statute and fundamentally alters the federal-state relationship, this Court's analysis was surprisingly sparse. Specifically, this Court observed:

> The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R.Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912.

Hensley, 461 U.S. at 429 (citations original) (footnote omitted). Moreover, in a footnote, this Court observed:

> A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. *See* H.R.Rep. No. 94-1558, p. 7 (1976); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("[A] district court may in its discretion

> award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

Hensley, 461 U.S. at 429 n.2 (citations and parenthetical original). In other words, the *sole* basis for this Court's conclusion that, under § 1988, prevailing plaintiffs should routinely recover attorneys' fees from the States, while prevailing States would almost never recover fees from the plaintiffs, was a series of statements made in congressional committee reports.[18] On that frail reed, this Court hung an interpretation of § 1988 that fundamentally disadvantages the States.

3. Moreover, to the extent this Court wishes to rely on committee reports rather than the text of the statute, the committee reports surrounding the adoption of § 1988 do not conflict with the Commonwealth's position. To illustrate, the House Committee Report makes it clear that the primary focus of § 1988 was "civil rights litigants" – that is, individuals claiming race or gender discrimination or the abridgement of individual rights specifically conferred by the Constitution. *See* H.R. Rep. No. 94-1559, pp. 1-5 (1976). Interpreting § 1988 asymmetrically, so as to benefit civil rights litigants at the expense of States, does not mean that an asymmetrical reading was also contemplated in cases involving only economic regulation statutes, such as the Parity Act. Treating the two sorts of cases differently also leaves room for the approach followed by lower courts in holding that sovereign immunity is abrogated or waived for racial and gender discrimination statutes. *See supra* at 6, n.10.[19]

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[18] While the Court also cited *Christiansburg*, that case dealt with Title VII, a fee statute not within the coverage of § 1988.

[19] Furthermore, while *Hensley* read § 1988 asymmetrically, it did so in the context of a case involving the deprivation of *constitutional* rights, not economic rights arising under Commerce Clause enactments. Given the power of Congress to abrogate sovereign immunity

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4. While this reliance on congressional committee reports *may* have resulted in an interpretation consistent with the concerns of those who sponsored the legislation, such reliance ignores the rule that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Over a century and a half ago, this Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used. . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).[20] This Court's deviation from the rule that the actual text of the

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under § 5 of the Fourteenth Amendment, *Hensley* was fundamentally different than the case at bar. This Court has never squarely addressed the issue of whether a different approach should be followed in cases involving only economic rights. While there are undoubtedly Commerce Clause cases where such asymmetrical treatment occurred, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Thus, *Hensley* does not necessarily apply here and need not be reversed in order for the Court to reach the result sought by the Commonwealth. This Court is free to consider the issue presented by the Commonwealth as one of first impression, and to rule in favor of the Commonwealth based on the merits of its position.

[20] As Justice Scalia noted in another context:

> It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men.

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statute must control the interpretation of the statute is, by itself, sufficient reason to revisit *Hensley*. However, there is a more compelling reason for doing so.

B. Revival of Dual Sovereignty

The more compelling reason centers on this Court's post-*Hensley* recognition that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n*, No. 01-46 slip op. at 6 (U.S. May 28, 2002). Quite simply, "the Constitution protects us from our own best intentions: *It divides power among sovereigns* and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187 (emphasis added).[21]

> Men may intend what they will; but it is only the laws that they enact which bind us.

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17 (1997).

[21] As Justice Kennedy wrote in a concurrence:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privy, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

U.S. Term Limits v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson, in *Letters From A Pennsylvania Farmer*, suggested that sovereignty was divided between the British Parliament and the Colonial Legislatures. *See* Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* 48-51 (6th ed. 1985). James Madison, writing in *The Federalist*, made the same point when he stated:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct

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Although the States surrendered many of their sovereign powers to the new national government, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[22] The principle that the Constitution divides power between *dual sovereigns*, the States and the national government, is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all

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> governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. The different governments will control each other, at the same time that each will control itself.

The Federalist No. 51, at 347 (James Madison) (Jacob E. Cooke ed., 1961.). *See also The Federalist No. 39*, at 250 (James Madison); *The Federalist No. 28*, at 176 (Alexander Hamilton); *The Federalist No. 81* at 541 (Alexander Hamilton).

[22] As this Court noted:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.
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> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory, 501 U.S. at 458 (citations omitted).

governmental powers, but only discrete, enumerated ones. *See Printz*, 521 U.S. at 919.[23]

1. Clear Statement Rule

"[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (Kennedy, J., joined by O'Connor, J., concurring). Thus, this Court has developed certain rules to preserve the delicate equilibrium that is dual sovereignty. First, this Court requires that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65 (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) ("*Pennhurst I*") (clear statement required to impose conditions on the receipt of federal funds). In a recent case, this Court recently observed:

> [W]e have good reason to rely on a clear statement principle of statutory construction. When "Congress intends to alter the 'usual constitutional

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[23] Indeed, this division of sovereignty between the States and the national government is preserved and reinforced by the Constitution's structure. *See Alden*, 527 U.S. at 714-15. These structural limitations, which are above and beyond the limitations imposed by the text of the Bill of Rights or other constitutional provisions, restrict the power of the national government so as to preserve the sovereignty of the States, and vice versa. *See generally* J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523 (2001). Thus, although the Constitution gives vast power to the national government, the national government remains one of enumerated, hence limited, powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

> balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" This principle applies when Congress "intends to pre-empt the historic powers of the States" or when it legislates in "'traditionally sensitive areas'" that "'affec[t] the federal balance.'" In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."

Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 122 S.Ct. 999, 1006 (2002) (citations omitted) (federal law tolling statute of limitations for state law claims brought in federal court is inapplicable when a State is the defendant).[24] In other words, the sovereignty of the States is far

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[24] Moreover, recent statements by this Court in other cases reinforce the primacy of the Clear Statement Rule. First, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court explicitly suggested that the Clear Statement Rule should be applied to the issue of whether there is implied private right of action to enforce Title VI against the States. *Id.* at 533. *See also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia & Thomas, J.J., dissenting) ("the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability"). Second, in *Owasso Indep. Sch. Dist. v. Falvo*, 122 S.Ct. 934 (2002), this Court rejected the Tenth Circuit's interpretation because such an interpretation:

> would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision.

Id. at 939. Finally, in *Correctional Services Corp. v. Malesko*, 122 S.Ct. 515 (2001), this Court suggested that a clear statement of congressional intent is always necessary to establish a private cause of action to enforce rights against governmental actors. *See* 122 S.Ct. at 519, n.3

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too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

Under the Clear Statement Rule, if Congress wished to enact a statutory scheme whereby States were required to routinely pay attorneys' fees to prevailing plaintiffs but rarely allowed to recover fees when the States prevailed, such an arrangement would have to be clearly and unambiguously stated in the statutory text. The actual words of § 1988, not some committee report that was read by few, if any, members of Congress, would have to state that Congress intended to impose on the States such a disadvantageous result. Obviously, the text of § 1988 contains no such provision. Indeed, as Justice Powell and his dissenting colleagues in *Hutto* noted, § 1988 does not even contain a statement mandating that the States will be liable for attorneys' fees. *See Hutto*, 437 U.S. at 704-06. In short, the Clear Statement Rule precludes *Hensley's* asymmetrical interpretation of § 1988 from being applied against the States.

2. Sovereign Immunity Prohibits the Courts from Discriminating against the States as a Class.

Second, even if Congress may circumvent sovereign immunity by expanding the definition of costs so as to include attorneys' fees, sovereign immunity still requires that the States be treated even-handedly by any such expansion. In other words, if the definition of costs is going to be expanded to include attorneys' fees, *sovereign immunity requires that fees be awarded according to the same basic principles that traditionally guided the award of*

("we have retreated from our previous willingness to imply a cause of action where Congress has not provided one"). *See also id.* at 524 (Scalia, J., joined by Thomas, J., concurring) ("we have abandoned that power to invent 'implications' in the statutory field").

other costs. Those principles included an even-handedness that is absent from § 1988 under *Hensley* as applied by the court of appeals.

To illustrate, in the pre-*Hutto* case of *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 70 (1927), this Court held that sovereign immunity is not a defense when assessing "costs," a concept that the Court did not then construe to include attorneys' fees. In explaining this result, this Court reasoned that a federal court's interest in expeditious, orderly proceedings "justifies [the court] in treating the state *just as any other litigant* and in imposing costs upon it." *Id.* at 77 (emphasis added). Thus, the Court implicitly recognized that the traditional approach to awarding costs was even-handed. States entered into litigation bearing the same risk of costs as their adversaries. For both parties, a loss meant exposure to an award of costs; a win meant an opportunity to collect costs.

By contrast, under § 1988, States now enter into litigation with the virtual certainty that they will have to pay fees if they lose, but will be unable to collect them if they win. Even if an award of fees is in keeping with the tradition of awarding costs, the bias against States is not. Sovereign immunity – and the basic structure of the federal union – protects States against such discrimination.

In *Hutto*, the Court's rationale for permitting an award of attorneys' fees against States, despite the Eleventh Amendment, was that losing litigants – be they plaintiffs or defendants – traditionally have been called upon to pay the "costs" of litigation. 437 U.S. at 695-96.[25]

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[25] Omitting attorneys' fees from the concept of "costs" was not simply a matter of tradition. There is also a fundamental conceptual distinction between "costs" designed to defray expenses incurred by the tribunal, and attorneys' fees designed to defray expenses incurred by a litigation adversary. *See Hutto*, 437 U.S. at 707-08 (Powell, J., joined by Burger, C.J., Stewart, Rehnquist, J.J., dissenting in part). Moreover, as Justice Powell and his dissenting colleagues noted, the *Hutto* majority's reliance on *Fairmont Creamery* was misplaced because the decision

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The Court expressly linked Congressional power to expand the definition of costs to even-handedness of treatment: "*Just as* a federal court may treat a State *like any other litigant* when it assesses costs, so also may Congress amend its definition of taxable costs. . . . " 437 U.S. at 696 (emphasis added). The decision in *Hensley* was a marked departure from the rationale of *Hutto* because, after *Hensley*, federal courts no longer treated States "like any other litigant" in assessing costs. Instead, they began to subject States to a rule far less favorable than the one applied to their litigation adversaries. Where an award of attorneys' fees does not comply with the even-handedness that has traditionally characterized exposure for costs, such an award cannot be justified by likening fees to the traditional concept of costs. Thus, reading § 1988 asymmetrically would cause the statute to violate sovereign immunity in violation of the Constitution. Such an interpretation must be avoided.

C. Summary

In sum, it seems unlikely that words buried in a committee report constitute a clear statement sufficient to radically diminish the sovereignty of the States and subject the States to a discriminatory statutory scheme. This is especially so when the discriminatory scheme – even if expressly adopted – would violate principles of sovereign immunity. Yet, this Court need not resolve these doubts in order to grant this petition. Rather, this Court should grant the petition and, after due deliberation, determine whether *Hensley* should be overruled, or at least distinguished in cases involving States, at least where civil rights are not at issue.

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involved expenses that were traditionally "costs" and did not even mention attorneys' fees. *See id.* at 707 n.5.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 6th day of June 2002.

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Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

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Counsel for Petitioners

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

National Home Equity Mortgage Association,

Plaintiff-Appellee,

v.

E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Defendants-Appellants,

and

Mark L. Earley,

Movant.

No. 01-1631

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-99-398-3)

Argued: January 25, 2002

Decided: March 8, 2002

Before NIEMEYER, LUTTIG, and KING, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Luttig and Judge King joined.

COUNSEL

ARGUED: William Henry Hurd, Solicitor General, Richmond, Virginia, for Appellants. Earle Duncan Getchell, Jr., MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee. **ON BRIEF:** Randolph A. Beales, Attorney General of Virginia, Judith Williams Jagdmann, Deputy Attorney General, Gregory E. Lucyk, Senior Assistant Attorney General, A. Ann Berkebile, Assistant Attorney General, Richmond, Virginia, for Appellants. Robert L. Hodges, William H. Baxter, II, MCGUIRE WOODS, L.L.P., Richmond, Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

On the petition of the National Home Equity Mortgage Association ("NHEMA") for attorneys fees, costs, and expenses under 42 U.S.C. § 1988, the district court awarded NHEMA $79,750. On appeal, officials of the Commonwealth of Virginia contend that the award is barred by principles of sovereign immunity and is improper because NHEMA did not prevail on a claim based on a right secured by federal law so as to be enforceable under 42 U.S.C. § 1983. Alternatively, they argue that special circumstances make an award of attorneys fees in this case unjust. For the reasons that follow, we reject these arguments and affirm.

I

NHEMA commenced this action in June 1999 to obtain declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against Virginia officials ("Virginia") who

were, under color of State law, allegedly depriving NHEMA members of their federal rights under the Alterative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801 *et seq.* (the "Parity Act"). In its complaint, NHEMA alleged that each of its members has, pursuant to the Parity Act, "federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without regard to state law" and that Virginia officials were "currently directing and authorizing the Bureau [of Financial Institutions] to enforce or threaten to enforce all of these punitive measures [under Virginia law] against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act." It also alleged that "[t]he Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983." Finally, NHEMA alleged that, under the Supremacy Clause, the Parity Act preempted Virginia law prohibiting prepayment penalties. NHEMA requested a declaratory judgment that the Virginia officials' actions were "depriving NHEMA members of their federal rights under color of state law," an appropriate injunction, and attorneys fees pursuant to 42 U.S.C. § 1988.

In its responses to NHEMA's complaint, Virginia took the position that NHEMA members did not have a cause of action under the Parity Act and that, in any event, the Parity Act did not preempt State regulations that prohibited prepayment penalties. In a memorandum in support of summary judgment, Virginia stated with respect to NHEMA's rights under the Parity Act, "The issue is thus whether the Parity Act implicitly created a private right of

enforcement under § 1983 to bar States from regulating prepayment penalties . . . . Nothing in the statute purports to create a federal right not to be regulated by States in the area of prepayment penalties." On the preemption issue, the State took the position that "[n]othing in the Parity Act, either expressly or in its structure and purpose, indicates that Congress intended to preempt state prepayment penalty laws."

On cross-motions for summary judgment, the district court granted summary judgment to NHEMA and permanently enjoined Virginia from enforcing its punitive measures, based on State law, against NHEMA members who were charging prepayment penalties as allowed under the Parity Act. In its memorandum opinion, the district court, applying the standard set forth in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990), concluded that Congress had not foreclosed private enforcement of the rights created by the Parity Act and, therefore, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983." The court also held that "state regulation of prepayment penalties [is] preempted by the Parity Act" and, therefore, "sections 6.1-330.83 and 6.1-330.85 of the Code of Virginia [are] preempted by the Parity Act."

In its initial appeal to this court, Virginia did not challenge the district court's conclusion that the Parity Act created federally enforceable rights. It raised only one issue, "Whether the district court erred in ruling that the [Parity Act] and the 1996 actions of the Office of Thrift Supervision preempt §§ 6.1-330.83 and 6.1-330.85 of the Code of Virginia . . . which prescribes limits on prepayment penalties." Addressing only that issue, a unanimous panel of this court rejected the appeal and affirmed the

district court's judgment. *Nat'l Home Equity Mortgage Ass'n v. Face,* 239 F.3d 633 (4th Cir. 2001).

After prevailing on its appeal, NHEMA filed a motion for attorneys fees, costs and expenses under 42 U.S.C. § 1988. While Virginia stipulated that $79,750 would be an appropriate amount for an award of attorneys fees, costs and expenses in this case, it opposed any award based on its constitutional sovereign immunity arguments and on its argument that the district court's preemption ruling did not involve a claim under 42 U.S.C. § 1983 because the Supremacy Clause was not a source of substantive rights enforceable under § 1983. By order dated April 5, 2001, the district court rejected Virginia's defenses and, pursuant to 42 U.S.C. § 1988, awarded NHEMA $79,750 in attorneys fees, costs and expenses. The court reasoned that its earlier ruling that NHEMA had federally enforceable rights under the Parity Act went unchallenged on appeal and concluded that NHEMA prevailed on the assertion of those rights. The court observed that when Virginia elected not to appeal its ruling on NHEMA's rights under the Parity Act, that ruling "became the law of the case and [became] binding on these proceedings." From the district court's order awarding NHEMA attorneys fees, costs, and expenses, Virginia filed this appeal.

II

Virginia contends first that sovereign immunity precludes an award of attorneys fees against State officers when no violation of the Fourteenth Amendment has been alleged. It argues that, in light of recent Supreme Court jurisprudence, such as *Seminole Tribe v. Florida,* 517 U.S.

44 (1996), the authority of district courts to award attorneys fees against State actors should be reexamined.

But as Virginia recognizes, this argument is squarely at odds with Supreme Court cases allowing awards of attorneys fees against State actors. *See Hutto v. Finney*, 437 U.S. 678, 695 (1978) (holding that because attorneys fees have traditionally been regarded as costs, which have long been awardable against a State, they may be awarded against a State "without regard for the states' Eleventh Amendment immunity"); *Missouri v. Jenkins*, 491 U.S. 274, 279-80 (1989) (reaffirming the holding in *Hutto* and clarifying that an application of § 1988 to the States does not require congressional abrogation of sovereign immunity). Because we lack authority to reconsider the Supreme Court's jurisprudence, we reject Virginia's argument. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

III

Virginia next contends that sovereign immunity bars an award of attorneys fees against State officers because the standard used in determining whether to award attorneys fees in a particular case favors private plaintiffs and, therefore, discriminates against the States. Virginia contends that "[c]oncepts of federalism demand that a prevailing plaintiff, such as NHEMA, must be placed on

the same footing which the Supreme Court has established for prevailing State defendants. Thus, attorney's fees should not be awarded absent a showing that a party's position was frivolous, unreasonable, and without foundation."

Again, this argument is at odds with existing Supreme Court precedent. Under current law, a court may award attorneys fees to prevailing *plaintiffs* as a matter of course, but to prevailing *defendants* only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (citation and internal quotation marks omitted); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)). The Supreme Court has established this differential standard, and, again, we lack the authority to change it.

IV

For its principal argument on appeal, Virginia contends that NHEMA was not a prevailing party on a claim brought pursuant to 42 U.S.C. § 1983 and, therefore, is precluded from recovering attorneys fees under 42 U.S.C. § 1988. It argues that, because our first opinion in this case focused exclusively on preemption and the Supremacy Clause, NHEMA did not prevail under § 1983 because the Supremacy Clause is not a source of substantive individual rights supporting a § 1983 action. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (noting that the Supremacy Clause is not "a source

of any federal rights" and, therefore, "of its own force, does not create rights enforceable under § 1983" (citation and internal quotation marks omitted)); *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160, 163 (4th Cir. 1989) (per curiam) ("We hold that federal preemption of local ordinances pursuant to the Supremacy Clause is not actionable under Section 1983. Therefore, there can be no award of attorney's fees under Section 1988").

This argument, however, overlooks the nature of NHEMA's complaint, the issues decided by the district court, and the limited review that we conducted in our earlier opinion. NHEMA brought its action under 42 U.S.C. § 1983 explicitly to vindicate rights it asserted were conferred on its members by the Parity Act, a federal statute. It alleged in its complaint that it had rights conferred by the Parity Act and that it was seeking to vindicate those rights in the face of conflicting State law. While NHEMA did assert that the rights created by the Parity Act trumped State law under the Supremacy Clause, its requested relief was to enforce its federal rights under the Parity Act despite conflicting State law. Thus, NHEMA sought to secure a federal right under § 1983.

When the parties filed cross-motions for summary judgment, they explicitly addressed whether the Parity Act conferred enforceable rights on NHEMA and its members. Virginia argued vigorously that no such rights were created, but NHEMA prevailed on that issue when the district court concluded, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983," applying the three part test in *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990). The district court reasoned that the test in *Wilder* was satisfied because "(1) nonfederally chartered housing creditors belonging to NHEMA are

intended beneficiaries of the Parity Act, (2) the Parity Act creates a present right to be free of state law, and (3) the judicial remedies being sought are traditional and well established." In addition to concluding that the Parity Act provided NHEMA and its members with rights enforceable under 42 U.S.C. § 1983, the court concluded that the provisions of the Parity Act creating those federal rights preempted Virginia's conflicting statutes – §§ 6.1-330.83 and 6.1-330.85 of the Virginia Code.

In appealing the district court's judgment, Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

While Virginia suggests by implication that perhaps we should now review the question of whether the Parity Act conferred rights on NHEMA, "[i]t is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations and internal quotation marks omitted). Accepting as the law of the case the conclusions that NHEMA has a federally enforceable right under the Parity Act – a conclusion that we do not review – and that NHEMA sought to enforce that right, we find that this case does not fall within the rule announced in *Golden State Transit* and *Maryland Pest Control*. In *Golden State Transit*, the Supreme Court ultimately concluded that the National Labor Relations Act created a

right to prevent State governmental interference with federally protected labor rights and that therefore 42 U.S.C. §1983 could be employed to enforce that right. 493 U.S. at 108-09. In *Maryland Pest Control*, we concluded that the plaintiff did not have a substantive right secured by a federal statute, determining instead that the case involved a pure Supremacy Clause issue, and that therefore no 42 U.S.C. § 1983 claim could be asserted. *Maryland Pest Control*, 884 F.2d at 163. In the circumstances before us, however, once the district court found that NHEMA had a federally enforceable right under the Parity Act, it correctly determined that NHEMA prevailed on that right through a § 1983 claim and therefore was justified in relying on § 1988 for its award of attorneys fees, costs, and expenses.

V

Finally, Virginia argues that special circumstances were presented in this case that would render an award of attorneys fees to NHEMA unjust. *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (stating that a prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (citation and internal quotation marks omitted)).

Articulating those special circumstances, Virginia asserts first that the nature of NHEMA, a nationwide trade association of mortgage lenders, was a special circumstance weighing against awarding fees because NHEMA can afford to hire its own lawyers. Second, Virginia asserts that the nature of the case, a nonconstitutional case with its own financial incentives for NHEMA, weighed against awarding fees. Third, Virginia asserts

that the nature of the defense – that "it would have been *irresponsible* for the Commonwealth to have abandoned these [Virginia] statutes enacted through the democratic process – without testing their validity through a vigorous defense in the courts" – weighed against awarding fees in this case.

Because the special circumstances exception is narrow and the special circumstances claimed here are not extraordinary, we conclude that none of them compel a finding that the district court abused its discretion by not applying the exception. *See Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 264 (4th Cir. 1998) (recognizing that "this 'special circumstances' exception is very 'narrowly limited'" and that "[o]nly on rare occasions does a case present such circumstances").

For the foregoing reasons, the order of the district court awarding attorneys fees, costs and expenses to NHEMA in the amount of $79,750 is

AFFIRMED

JUDGMENT

FILED: March 8, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

Appeal from the United States District Court for the Eastern District of Virginia at Richmond

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

April 16, 2002

MANDATE

TO: Clerk, District Court/Agency

FROM: Lisa Jernigan
Deputy Clerk

RE: 01-1631 Natl Home Equity v. Face
CA-99-398-3

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 3/8/02.

[ ] Order and Certified Copy of Judgment
[X] Opinion and Certified Copy of Judgment
[X] Order on Costs
[ ] Order dismissing appeal R42(b) or Local Rule R45
[ ] Other: _____
[ ] The record has been retained for use in case number _____

A copy of the judgment is enclosed to counsel/pro se parties.

cc: William Harrison Baxter II
Earle Duncan Getchell Jr.
Alice Ann Berkebile
Judith Williams Jagdmann
William Henry Hurd
Martha B. Brissette

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1631
CA-99-398-3

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

Plaintiff – Appellee

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission; SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission

Defendants – Appellants

MARK L. EARLEY

Movant

ORDER

(Filed April 16, 2002)

Appellants have filed a motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari.

The Court denies the motion.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Luttig and Judge King.

For the Court,
/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SUSAN E. HANCOCK,
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

MEMORANDUM OPINION

This matter is before the Court on the plaintiff's motion for attorney's fees, costs and expenses. The motion follows the Court granting the plaintiff's motion for summary judgment and denying the defendants' motions for summary judgment in a Memorandum Opinion dated September 9, 1999, which was followed by an appeal to the United States Court of Appeals for the Fourth Circuit.

The case involved the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06 ("the Parity Act"), and whether it preempted Virginia laws limiting prepayment penalties. National Home Equity Mortgage Association ("NHEMA" or "plaintiff") filed a motion for summary judgment asserting that the Parity Act preempted Virginia laws. Defendants E. Joseph Face, Jr. and Susan E. Hancock, from the Virginia State Corporation Commission ("SCC defendants") and intervenor-defendant Mark L. Earley, Attorney General of Virginia ("the Attorney General") also filed motions for summary judgment, both asserting that the Parity Act did not apply to Virginia's statutory prepayment penalty limits. The Court issued a Memorandum Opinion and Order granting the plaintiff's motion and denying the defendants' motions. *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 584 (E.D. Va. 1999). The defendants and the intervenor-defendant then appealed to the United States Court of Appeals for the Fourth Circuit. The matter was argued on October 30, 2000 and decided on February 7, 2001. The United States Court of Appeals affirmed the district court by published opinion. *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir. 2001).

The parties have agreed that, if the Court grants the motion for attorney's fees, costs, and expenses, the amount to be awarded the plaintiff is $79,750.00 in attorney's fees, costs and expenses.

The plaintiff moves for attorney's fees based on 42 U.S.C. § 1988, arguing that because the Court granted its summary judgment motion, it is the prevailing party under 42 U.S.C. § 1983. Ordinarily, a prevailing party in a section 1983 action "should . . . recover an attorney's fee unless special circumstances would render such an award

unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Section 1988 states in relevant part that "[i]n any action or proceeding to enforce a provision of [§ 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

The defendants and intervenor-defendant raise several arguments that NHEMA is not entitled to attorney's fees or costs. First, they argue that *Maryland Pest Control Ass'n v. Montgomery County, Maryland*, 884 F.2d 160 (4th Cir. 1989) (per curiam), *cert. denied*, 494 U.S. 1056 (1990), mandates that the plaintiff not be awarded attorney's fees and costs. In *Maryland Pest Control*, the Fourth Circuit framed the issue as: "the question in this case is whether the Associations' successful argument, grounded in the Supremacy Clause, that FIFRA preempted local laws will support a civil rights action under Section 1983 which would entitle them to attorney's fees under Section 1988." 884 F.2d at 162. The Fourth Circuit noted that several circuits, including the Ninth, the Tenth, and the Seventh, have held that the Supremacy Clause is not a source of substantive individual rights that could support an action brought pursuant to Section 1983. *Id.* at 162-163.

However, in the present case, the Court did not hold that the Supremacy Clause created rights enforceable under section 1983. Instead, the Court applied the three-part test set forth in *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990), and specifically ruled that NHEMA "has a federally enforceable right under 42 U.S.C. § 1983," the right "to be free of state law." 64 F. Supp. at 591. Therefore, the exception implied in the final paragraph of *Maryland Pest Control* – that if an action is maintainable

under section 1983 as a suit to enforce statutory rights, then there can be an award of attorney's fees under section 1988 – is applicable. An examination of the most recent cases addressing the three-part test to determine whether a statute gives rise to a federal right enforceable under section 1983 supports the Court's previous determination. *See Blessing v. Freestone*, 520 U.S. 329 (1997); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).

In addition, this decision of the Court was not challenged on appeal by the defendants or the intervenor-defendant. The Court has reviewed the briefs the parties filed in the Fourth Circuit, as well as the opinion of the Fourth Circuit. The appellants failed to appeal the Court's ruling that NHEMA has a federally enforceable right under section 1983. Accordingly, that ruling became the law of the case and is binding in these proceedings. *See Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 985-86 n.2 (Fed. Cir. 1999) ("It is particularly appropriate to invoke law of the case principles when a party has decided not to appeal an issue and further proceedings are conducted in reliance on that decision.").

Defendants and intervenor-defendant make additional arguments that the plaintiff is not entitled to attorney's fees, arguing that such an award is barred by sovereign immunity, under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and arguing that there are special circumstances in this case that render an award of attorney's fees unjust, pursuant to *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court disagrees with defendants' arguments, finding that they are without merit.

An appropriate Order shall issue.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v. Civil Action Number: 3:99CV398

E. JOSEPH FACE, JR.,
Commissioner of Financial Institutions,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

SUSAN E. HANCOCK
Deputy Commissioner, Consumer Finance,
Bureau of Financial Institutions,
Virginia State Corporation Commission,

Defendants,

MARK L. EARLEY,
Attorney General of Virginia,

Intervenor-Defendant.

FINAL JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS plaintiff's motion for attorney's fees, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

It is so ORDERED.

Let the Clerk send a copy of this Final Judgment Order and the accompanying Memorandum Opinion to all counsel of record.

DATE: April 5, 2001

/s/ Richard L. Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION,

Plaintiff.

v.

E. JOSEPH FACE, JR., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 3:99CV398

_____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered a verdict.

__X__ **Decision by Court.** This action came to hearing before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court GRANTS plaintiff's motion for attorney's fees, costs, and expenses and hereby ENTERS JUDGMENT for the plaintiff against the defendants, Face and Hancock, in the amount of $79,750.00.

DATE: April 5, 2001

Norman H. Meyer, Jr.
Clerk

/s/ _____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Plaintiff,

v.

E. JOSEPH FACE, JR., Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

SUSAN E. HANCOCK, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

SERVE:
1300 East Main Street
Suite Eight Hundred
Post Office Box 640
Richmond, VA 23218-0640

Defendants.

Civil Action No. 399CV898

VERIFIED COMPLAINT FOR DECLARATORY RELIEF AND PRELIMINARY AND PERMANENT INJUNCTIONS FOR VIOLATION OF 42 U.S.C. § 1983

(Filed Jun. 1, 1999)

Plaintiff National Home Equity Mortgage Association ("NHEMA") states the following as its Verified Complaint against Defendants E. Joseph Face, Jr., Commissioner of Financial Institutions, Bureau of financial Institutions, Virginia State Corporation Commission, and Susan E. Hancock, Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission:

THE PARTIES

1. National Home Equity Mortgage Association ("NHEMA") is the largest national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. NHEMA membership includes entities that are currently licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06, (the "Parity Act") and are thus subject to its provisions.

2. E. Joseph Face, Jr., is Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial

services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

3. Susan E. Hancock is Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section which examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau of Financial Institutions. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia.

JURISDICTION AND VENUE

4. Jurisdiction is conferred upon the Court by 28 U.S.C. § 1331 and by 28 U.S.C. §§ 1343(3)-(4) in this suit complaining of the denial of federal rights under color of state law forbidden by 42 U.S.C. § 1983.

5. Authority to order a reasonable award of attorneys' fees and costs is conferred by 42 U.S.C. § 1988.

6. Declaratory relief is proper under 28 U.S.C. § 2201.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b).

GROUNDS FOR RELIEF

Alternative Mortgage Transactions

8. An alternative mortgage transaction describes a residential-based loan or credit sale in which the lender

may raise the interest rate, renegotiate the finance charge, or implicitly adjust the mortgage rate by allowing debt to mature faster than anticipated in the original amortization schedule. 12 U.S.C. §§ 3802(1)(A)-(B). The definition of an alternative mortgage transaction also includes the changing of any other term or variation not common to traditional fixed-rate or fixed-term transactions. 12 U.S.C. § 3802(1)(C); 12 C.F.R. § 560.2(b)(5).

9. Congress has found that such mortgages are essential in providing an adequate supply of credit secured by residential property to those demanding such credit. 12 U.S.C. § 3801(a)(2).

10. The National Credit Union Administration, Comptroller of the Currency, and Director of the Office of Thrift Supervision have all recognized the significance and value of such mortgages by adopting regulations permitting federally chartered banking institutions to enter this industry. 12 U.S.C. § 3801(a)(3).

11. Federally chartered banking institutions thus engage in direct competition with smaller state regulated establishments to make, purchase, and enforce such mortgages on the open market.

The Alternative Mortgage Transaction Parity Act of 1982

12. In the early 1980s, Congress determined that federal regulations governing such mortgages heavily favored federally chartered banking institutions. 12 U.S.C. § 3801(a)(2).

13. To eliminate this discriminatory impact, Congress enacted the Parity Act and thereby attempted to

create a level playing field for all financial services institutions that either supplied or wanted to supply such mortgages by affording housing creditors authority to make, purchase, and enforce these mortgages. 12 U.S.C. § 3801(b).

14. The Parity Act defines a housing creditor in relevant part as "any person who regularly makes loans, credit sales, or advances secured by interests in properties . . . or any transferee of them." 12 U.S.C. § 3802(2)(C)-(D).

15. The Parity Act provides that all housing creditors have general authority to make, purchase, and enforce alternative mortgage transactions in accordance with regulations issued by the Director of the Office of Thrift Supervision governing federal savings and loan associations. 12 U.S.C. § 3803(a)(3).

16. The Director of the Office of Thrift Supervision has rulemaking authority pursuant to 12 U.S.C. §§ 1463(a), 1464(a) to regulate federally chartered savings and loan organizations. The Director of the Office of Thrift Supervision has given federal savings and loan organizations federal rights to charge prepayment penalties without regard to state laws. 12 C.F.R. §§ 560.2(a), (b)(5).

Mandatory Requirements for Opting Out of The Parity Act

17. Congress expressly afforded each state the opportunity under 12 U.S.C. § 3804(a) to opt out of the preemption provisions of the Parity Act between October 15, 1982, and October 15, 1985, by enacting, or adopting by referendum or constitutional amendment, a new law, stating explicitly and by its terms that the state opting out

did not want the Parity Act to preempt state laws regarding alternative mortgage transactions.

Failure of the Commonwealth of Virginia to Opt Out Gives NHEMA Members Qualifying as Housing Creditors under the Parity Act Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions Made, Purchased, and Enforced in the Commonwealth of Virginia

18. The Commonwealth of Virginia failed to enact or adopt by referendum or constitutional amendment any such law stating explicitly and by its terms that it did not want the Parity Act to preempt Virginia laws regarding alternative mortgage transactions made, purchased, and enforced within that state.

19. Through acts that were not passed within the required time period and that do not contain any reference to the Parity Act, the Virginia General Assembly purports to limit and regulate prepayment penalties contrary to the Parity Act. 1987 Va. Acts ch. 622 (codifying Va. Code Ann. §§ 6.1-330.83, .85).

NHEMA Members Have Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions in the Commonwealth of Virginia

20. Pursuant to 12 U.S.C. § 3803(a)(3) and 12 C.F.R. §§ 560.2(a), (b)(5), every NHEMA member subject to the provisions of the Parity Act and licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, has federal rights to charge prepayment penalties for every alternative mortgage transaction made, purchased, or enforced in the Commonwealth of Virginia without

regard to state law. These federal rights preempt any limits on prepayment penalties enacted under Virginia state law. Va. Code Ann. §§ 6.1-330.83, .85.

The Bureau of Financial Institutions, Virginia State Corporation Commission, Through Defendants, is Illegally Revoking Under Color of State Law NHEMA Members' Federal Rights to Charge Prepayment Penalties on Alternative Mortgage Transactions

21. NHEMA members who qualify as housing creditors under the Parity Act and conduct business within the Commonwealth of Virginia are automatically licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to make, purchase, and enforce alternative mortgage transactions within the Commonwealth of Virginia. Va. Code Ann. § 6.1-410. Their rights to charge prepayment penalties in accordance with the Parity Act continue in perpetuity because the Commonwealth of Virginia never opted out of its preemption provision in the form or manner described in 12 U.S.C. § 3804(a).

22. In the April 1999 edition of the official newsletter *The Compliance Connection: Regulatory News for Virginia Mortgage and Consumer Finance Licensees,* Defendants announced or permitted to be announced that the Parity Act does not preempt Virginia laws limiting prepayment penalties for alternative mortgage transactions. This article is attached as Exhibit A.

23. In stating its policy, the Bureau of Financial Institutions, acting through or on the authority of Defendants, referred to "numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift

Supervision's counsel and various states' Attorneys General which opine that the [Parity Act] preempts Virginia law."

24. The announcement continued: "[t]he Bureau does not agree with these opinions."

25. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will "continue to cite [entities charging prepayment penalties in excess of state limits on alternative mortgage transactions for] violations of Virginia statutes relating to prepayment penalties." *See* Va. Code Ann. §§ 6.1-330.83, .85.

26. Speaking for the Bureau of Financial Institutions, the announcement stated that the Bureau will require such entities "to refund prepayment penalties collected, in excess of the state law limits."

27. Speaking for the Bureau of Financial Institutions, the announcement stated that such entities must notify "current borrowers so they will be aware that any higher penalty cannot be enforced." Moreover, "[a] copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified."

28. Speaking for the Bureau of Financial Institutions, the announcement stated that exercise of the federal right to charge prepayment penalties without regard to state law subjects housing creditors to license revocation.

29. Speaking for the Bureau of Financial Institutions, the announcement stated that charging prepayment penalties in excess of state limits will cause the Bureau to refer such entities to the Office of the Attorney General for

investigation of violations of Va. Code Ann. §§ 6.1-330.83, .85 and for potential legal action pursuant to Va. Code Ann. § 6.1-430.

30. Defendants are currently directing and authorizing the Bureau to enforce or threaten to enforce all of these punitive measures against NHEMA members who are lawfully invoking their federal rights to charge prepayment penalties under the Parity Act.

31. The Supremacy Clause (U.S. Const. art. VI, § 2) guarantees that federal laws made under the authority of the United States shall prevail over contrary state laws.

32. The Parity Act creates immediately enforceable rights under 42 U.S.C. § 1983 and Congress has not foreclosed the enforcement of these rights through a civil action filed under 42 U.S.C. § 1983. These rights are substantial, and not too vague or amorphous so as to preclude judicial enforcement through 42 U.S.C. § 1983.

33. NHEMA members subject to the Parity Act have individual standing because they face real and present harm in the form of Defendants' order to notify borrowers and investors that no negotiated prepayment penalty in excess of state limits is enforceable and through the announced intention to punish entities for their past and future exercise of federal rights. NHEMA as a voluntary trade association has standing to assert these rights on behalf of its members.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief:

1. Appropriate declaratory relief that Defendants' actions are depriving NHMEA members of their federal rights under color of state law.

2. Appropriate injunctive relief requiring Defendants to immediately cease enforcement of punitive measures against NHEMA members for exercising their federal rights to charge prepayment penalties in excess of state limits on alternative mortgage transactions.

3. An award of reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

4. Such other relief as the Court may deem appropriate.

Respectfully submitted,

NATIONAL HOME EQUITY
MORTGAGE ASSOCIATION

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VERIFICATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of June, 1999 at Washington, D.C.

/s/ [Illegible]

EXHIBIT A

The Compliance Connection

State Corporation Commission – Bureau of Financial Institutions Regulatory News for Virginia Mortgage and Consumer Finance Licensees **APRIL 1999**

Federal Preemption of Virginia's Prepayment Penalty Laws:

The major topic lately has been the debate over whether the Alternative Mortgage Transaction Parity Act (AMTPA) preempts Virginia laws that place limits on prepayment penalties. The Bureau has received numerous opinion letters from attorneys, along with copies of opinions from the Office of Thrift Supervision's counsel and various states' Attorneys General which opine that the AMTPA preempts Virginia law. The Bureau does not agree with these opinions.

We believe Congress' intention in passing the AMTPA was to authorize, in the case of "housing creditors', the OTS

to override state laws which prevented the making of mortgage loans having certain features not common to conventional mortgage loans. We understand the AMTPA gave housing creditors the right to enter into alternative mortgage loan transactions in accordance with OTS regulations only "to the extent that such regulations are authorized by rulemaking authority granted to [the OTS] . . . under laws other than this section (12 U.S.C. §3803)." The prepayment provisions of Virginia law do not prevent or impede creditors from making adjustable rate loans or other non-conventional mortgage loans (balloon, shared equity loans). They never have.

In our opinion, in §3802(1)(c) of the AMTPA, Congress explicitly restricted the OTS's authority to preemption of only such state laws as related to features " . . . not common to traditional fixed-rate, fixed-term transactions . . . " The Virginia statutes applicable to prepayment penalties, §§6.1-330.83 and 6.1-330.85 of the Code of Virginia, govern a longstanding feature of conventional mortgage lending which Congress left to state law under §501(b)(4) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). To express the matter more simply, our view is that federal law governs unconventional features of "alternative mortgage transactions", while state law governs conventional features of such loans, as Congress intended.

In addition, under § 501(b)(4) of DIDMCA, the states had an unlimited period of time within which to "opt out" of federal preemption of "points and other charges" connected with federally-related mortgage loans, and no particular formality was required. Virginia opted out as authorized by Congress by amendment and recodification of its money and interest laws in 1987, including

statutes related to points, late charges, prepayment penalties, etc. permitted in connection with mortgage loans. Therefore, it was unnecessary to opt out of federal preemption under AMTPA.

Bureau examiners will continue to cite violations of Virginia statutes relating to prepayment penalties. Licensees found in violation will be required to refund prepayment penalties collected, in excess of the state law limits. In addition, notification of Virginia's limit on prepayment penalties must be provided to current borrowers so they will be aware that any higher penalty cannot be enforced. A copy of the notification must be made a part of the permanent loan file, and investors who have purchased loans providing for penalties in excess of the penalty set forth in the Virginia Code must also be notified.

In addition to possible revocation of license, such violations can be referred to the Attorney General's office for investigation pursuant to Virginia Code §6.1-430.